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IN THE ARIZONA SUPREME COURT

In the Matter of:

**PETITION TO AMEND ER 8.4,
RULE 42, ARIZONA RULES OF
THE SUPREME COURT**

Supreme Court No. R-17-00328

**Comment to Petition to
Amend ER 8.4, Rule 42**

Pursuant to Rule 28(D), Ariz. R. Sup. Ct., I write in support of the rule-change proposal to amend Ethical Rule (ER) 8.4 of the Arizona Rules of Professional Conduct and adopt American Bar Association (ABA) Model Rule 8.4(g).

The broad sentiment behind Model Rule 8.4(g) is not new. Before the ABA adopted Model Rule 8.4(g), Model Rule 8.4 included anti-discrimination and anti-harassment language in a comment, but not in the rule itself. It linked the conduct to Model Rule 8.4(d), which prohibits conduct "prejudicial to the administration of justice." The previous comment 3 to Model Rule 8.4 provided:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

1 The broad sentiment behind Model Rule 8.4(g) also is not new in Arizona.
2 This court adopted the ABA's previous comment 3 in 2001, adding "gender identity"
3 to the list of categories in 2003. This is the version of the comment we have 15 years
4 later.

5 Rule-change petition R-17-0032 also is not the first attempt since 2003 to
6 revise the comment or the rule to address bias and discrimination. In 2010, the State
7 Bar of Arizona filed rule-change petition R-10-0031, which essentially proposed
8 importing the substance of existing comment 3 into the text of ER 8.4. After
9 extensive objections were filed, the State Bar withdrew that petition, with a plan to
10 appoint a task force to study the issue. Rule-change petition R-13-0019 resulted.
11 That petition and another filed by an individual lawyer, R-12-0018, both proposed
12 keeping but revising comment 3. This court ultimately rejected both petitions.

13 Those previous attempts were not based on nationally vetted model language.
14 Model Rule 8.4(g) has been extensively vetted by the ABA, which bills itself as the
15 national representative of the legal profession and has, as one of its four goals, to
16 eliminate bias in the legal profession and justice system and enhance diversity.

17 Model Rule 8.4(g) is different in several ways from the previous Model Rule
18 8.4 comment and Arizona's current comment. The new rule:

- 19 • Substitutes the more specific phrase "harassment or discrimination"
20 for "bias or prejudice." (A comment notes that the substantive law of
21 anti-discrimination and anti-harassment statutes and case law may
22 guide application of Model Rule 8.4(g).)
- 23 • Uses the more understandable phrase "engage in conduct that the
24 lawyer knows or reasonably should know" and eliminates "knowingly
25 manifests by words or conduct."

- Adds to the preexisting eight prohibited bases three new ones: ethnicity, gender identity, and marital status. (Arizona’s version of the comment has nine categories because, unlike previous Model Rule 8.4 comment 3, it includes gender identity.)

Model Rule 8.4(g) also explicitly addresses one reason some lawyers have objected to anti-bias provisions: their belief that they would be forced to take on clients to whom they might have moral objections. Model Rule 8.4(g) explicitly “does not limit the ability of a lawyer to accept, decline, or withdraw from a representation.”

Arizona needs to adopt Model Rule 8.4(g) – it probably would be our ER 8.4(h), because we already have a (g) related to noticing judges for improper cause – for the reasons stated in the petition plus others.

First, anti-bias language needs to be in a rule, not a comment. Comments are not rules. The preamble to the Arizona Rules of Professional Conduct addresses this point twice. *See* Preamble, paragraph 14 (“Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”), and paragraph 21 (“The comments accompanying each Rule explain[] and illustrate[] the meaning and purpose of the Rule... The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”) The ABA report¹ proposing Model Rule 8.4(g) noted that the Model Rule 8.4 anti-bias provision was

¹ Report to the ABA House of Delegates as revised (last visited May, 21, 2018) available at:

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf

1 “the only example in the Model Rules where a Comment [purports] to ‘solve’ an
2 ethical issue that otherwise would require resolution through a Rule.”

3 Second, Model Rule 8.4(g) broadens the scope of the anti-bias sentiment. The
4 former Model Rule 8.4 comment 3 – the one we still have – requires that the conduct
5 be “in the course of representing a client” and “prejudicial to the administration of
6 justice.” Model Rule 8.4(g) is not limited the same way. While the conduct must be
7 “related to the practice of law,” it need not be prejudicial to the administration of
8 justice, which often is construed to mean involving court proceedings and processes.
9 New comment 4 to Model Rule 8.4 explains that conduct “related to the practice of
10 law” includes

11 representing clients; interacting with witnesses, coworkers, court
12 personnel, lawyers and others while engaged in the practice of law;
13 operating or managing a law firm or law practice; and participating in
14 bar association, business or social activities in connection with the
practice of law.

15 Third, adding explicit anti-bias language in a black-letter rule frankly elevates
16 the importance of the sentiment. The report to the ABA House of Delegates
17 proposing Model Rule 8.4(g) points out that by adopting former comment 3, “the
18 ABA did not squarely and forthrightly address prejudice, bias, discrimination and
19 harassment as would have been the case if this conduct were addressed in the text of
20 a Model Rule.” ABA Report at 2. If we are serious about combatting discrimination
21 and harassment in the practice of law in Arizona, we need to put the prohibition front
22 and center in a rule.

23 Fourth, putting that prohibition front and center in a rule drives home the point
24 to the public that the legal profession strives to be fair and unbiased, and that we
25 expect to be held to that standard.

1 Finally, having a clear, separate prohibition in the rule puts lawyers on notice
2 about prohibited conduct. The existing comment 3 does not explain how a lawyer
3 “knowingly manifests by words or conduct, bias or prejudice.” New Model Rule
4 8.4(g) comment 3 better explains the prohibited conduct. For example, it explains
5 discrimination as including “harmful verbal or physical conduct that manifests bias
6 or prejudice towards others.” It also explains harassment as including “sexual
7 harassment and derogatory or demeaning verbal or physical conduct” and sexual
8 harassment as including “unwelcome sexual advances, requests for sexual favors,
9 and other unwelcome verbal or physical conduct of a sexual nature.”

10 Other jurisdictions have split over whether to adopt Model Rule 8.4(g), and
11 some lawyers contend the rule is unnecessary or unconstitutional. According to the
12 ABA², among the 50 states and the District of Columbia, as of March 2018, only
13 Vermont had adopted Model Rule 8.4(g) while Illinois, Minnesota, Montana, and
14 South Carolina have declined to do so. But many states – including two (Illinois and
15 Minnesota) that have rejected Model Rule 8.4(g) -- *already have* what the ABA calls
16 “pre-existing rules analogous to Model Rule 8.4(g)”: California, Colorado, Florida,
17 Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Missouri, Nebraska,
18 New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island,
Washington, and Wisconsin.

19 Arizona does not have a pre-existing rule analogous to Model Rule 8.4(g). For
20 the above reasons, Arizona should adopt it and the new accompanying comments
21 that explain it.

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23
24 ² Implementation chart (last visited May, 21, 2018) available at:
25 https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adapt_8_4_g.authcheckdam.pdf

1 RESPECTFULLY SUBMITTED May 21, 2018.

2
3 /s/ Patricia A. Sallen

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